

No. 87-1581

Supreme Court, U.S.

FILED

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In the Supreme Court of the United States
OCTOBER TERM, 1987

DR. PAUL KURTZ, PETITIONER

v.

JAMES A. BAKER, SECRETARY OF THE TREASURY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

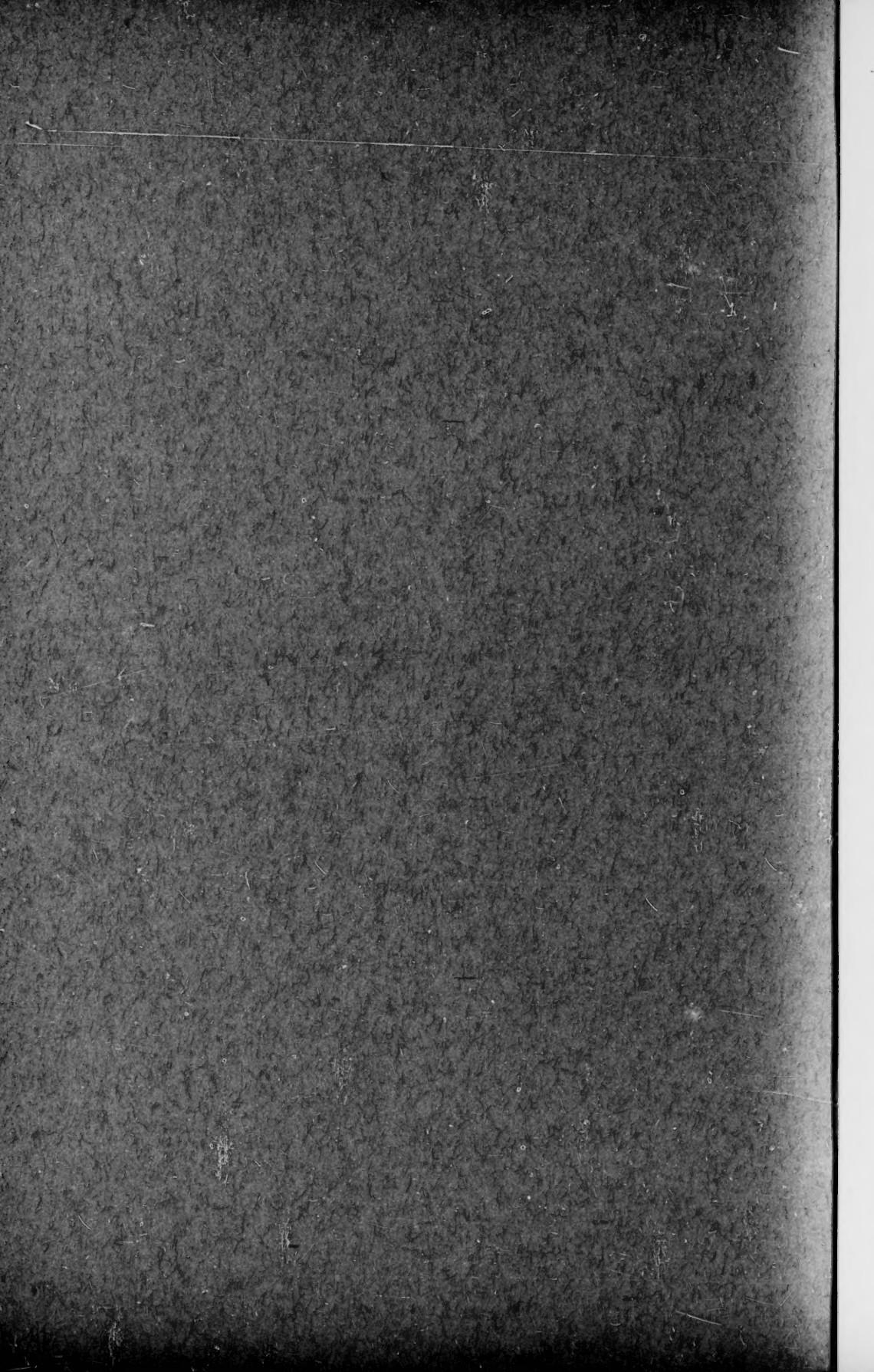
BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a secular humanist who applied to the House and Senate Chaplains for an opportunity to participate in the opening ceremonies as a guest chaplain, had standing to challenge the Chaplains' denial of permission to address the Congress.



TABLE OF CONTENTS

	Page
Opinions	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

<i>Adderley v. Florida</i> , 385 U.S. 39 (1966)	10
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968)	5
<i>Greer v. Spock</i> , 424 U.S. 828 (1976)	10
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983)	4, 6, 7, 8, 9
<i>Minnesota State Bd. for Community Colleges v. Knight</i> , 465 U.S. 271 (1984)	10
<i>Perry Educ. Ass'n v. Perry Local Educators' Ass'n</i> , 460 U.S. 37 (1983)	10, 11
<i>United States Postal Service v. Council of Greenburgh Civic Ass'ns</i> , 453 U.S. 114 (1981)	9-10

Constitution and rules:

U.S. Const.:	
Art. I, § 6, Cl. 1 (Speech or Debate Clause)	4
Art. III	4, 5, 6
Amend. I	4, 8, 9
Establishment Clause	4, 6, 8, 9
Free Exercise Clause	4
Free Speech Clause	4
Amend. V (Due Process Clause)	8
W. Brown, <i>Constitution—Jefferson's Manual and Rules of the House of Representatives</i> , H.R. Doc. 99-279, 99th Cong., 2d Sess. (1987):	
Rule II	8
Rule VII	8
Rule XXIV	8

IV

Rules—Continued:	Page
<i>Standing Rules of the Senate and Congressional Budget and Impoundment Control Act of 1974, as amended, S. Doc. 100-4, 100th Cong., 1st Sess. (1987):</i>	
Rule IV	7

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OPINIONS

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 829 F.2d 1133. The opinion of the district court (Pet. App. 40a-61a) from which appeal was taken is reported at 630 F. Supp. 850.¹

JURISDICTION

The judgment of the court of appeals (Pet. App. 78a-79a) was entered on September 18, 1987. The petition for rehearing and rehearing en banc was denied on November 25, 1987 (Pet. App. 80a-81a). On February 12, 1988, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 24, 1988, and the petition was filed on March 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹ A related opinion of the district court (Pet. App. 62a-77a) from which no appeal was taken (Pet. 6 n.5) is reported at 644 F. Supp. 613.

STATEMENT

1. On February 13, 1984, petitioner, a professor of philosophy and advocate of secular humanism, wrote to the Reverend Richard Halverson, Chaplain of the Senate, requesting "the opportunity to appear as a guest speaker and to open a daily session * * * with a short statement in which [he] would remind the [members of the Senate and the House] of their moral responsibilities." He advised Reverend Halverson that "[a]s a secular humanist, [he] would not, of course, invoke any deity during [his] remarks," but suggested that his comments "would otherwise fall within the traditional format." Petitioner further proposed that "[i]f for some reason you believe it is necessary to open the session with the invocation of a deity," petitioner "would have no objection to sharing the podium" with Reverend Halverson. Petitioner sent a similar letter to the Chaplain of the House of Representatives, Reverend James Ford. Pet. App. 4a (citation omitted).

Two weeks later, Reverend Halverson responded to petitioner's letter, advising him that as Chaplain his "policy has been to invite those who are sponsored by a Senator" (Pet. App. 3a (citation omitted)). Petitioner thereafter wrote to Senators Moynihan, Weicker, D'Amato, Goldwater, and Hatfield to seek sponsorship, but without success (*id.* at 4a). Only Senator Hatfield's office replied, and his Chief Legislative Assistant advised petitioner that (*ibid.*; C.A. App. 42):

Senate rules preclude the possibility of non-Senators making remarks on the Senate floor. The opening of each Senate session * * * consists of a prayer by either the Chaplain or a guest minister. There is no provision or desire for lectures from whatever source. * * * [T]he intent of the time of prayer is to acknowledge our dependence upon the transcendent Creator.

The letter further stated that the Senator had a backlog of requests for the " 'guest pastor' slots," and said that "it would be impossible for Senator Hatfield to use one of his rare opportunities to present a guest pastor for someone who [sic] he does not know and who cannot out of conviction abide by the spirit of the rules of the Senate" (Pet. App. 4a; C.A. App. 42).

After failing to obtain a senatorial sponsor, on August 30, 1984, petitioner renewed his request to Reverend Halverson that he be invited as a "guest speaker." Reverend Halverson responded on September 7, again denying petitioner's request. He explained that as Chaplain he was allowed to invite "two guests per month to open the Senate with prayer," and that his privileges did not include "inviting someone to speak, however briefly." He also noted that since only Senators were allowed to speak in the Senate, any exception would have to be made by the Senate itself. Pet. App. 3a (citation omitted).

On March 26, 1984, Reverend Ford denied petitioner's request to appear as a guest speaker before the House of Representatives. He explained that the rules of the House provide for opening the session only with prayer and that it was "therefore impossible, pursuant to the rules of the House, for [him] to invite [petitioner] [to] be * * * a guest speaker." Petitioner made a second request of Reverend Ford on April 6, 1984, but Ford replied that "[t]he chaplain cannot yield to another person for a statement." Petitioner then proposed that he and Reverend Ford "deliver a truly joint opening by alternating the lines of [their] texts." Reverend Ford did not respond to this final suggestion. Pet. App. 5a (citations omitted).

2. On September 19, 1984, petitioner filed an action in the United States District Court for the District of Columbia, naming as defendants Reverend Halverson; Reverend

Ford; the Secretary of the Treasury, James Baker; and the Treasurer of the United States, Katherine Ortega. The complaint contained two counts. In Count One, petitioner alleged that the exclusion of non-theists from the guest chaplain program in Congress constituted content-based discrimination and therefore violated the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, and the equal protection component of the Due Process Clause of the Fifth Amendment. In Count Two, petitioner alleged that Reverend Halverson had made disparaging remarks about non-theists, so that funding of the Chaplain's office was a violation of the Establishment Clause. Pet. App. 5a-6a.

On March 11, 1986, the district court granted summary judgment against petitioner on Count One of the complaint (Pet. App. 40a-61a). The court first held that petitioner's claims were not barred by the standing requirements of Article III, the doctrine of justiciability, or the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1 (Pet. App. 46a-51a). Turning to the merits, the court found that the guest chaplain program constituted a "non-public forum," in that "the government has not only limited access to [the] forum according to an articulated purpose, but also has consistently required government permission for access" (*id.* at 53a). As a non-public forum, the court noted (*id.* at 54a), "distinctions as to guests need only be reasonable and viewpoint neutral." The court held that the chaplain program met that standard of reasonableness. Relying on *Marsh v. Chambers*, 463 U.S. 783 (1983), the court explained (Pet. App. 55a) that "a legislature may constitutionally choose to listen exclusively to prayer, as opposed to nonprayer, in the opening moments of each session." The court concluded (*id.* at 56a) that "in so limiting the expression in the forum, the

Chaplains do not engage in unconstitutional viewpoint discrimination.”²

3. Considering petitioner’s appeal of the dismissal of Count One, the court of appeals vacated the judgment for want of standing, and remanded with instructions to dismiss the complaint (Pet. App. 1a-39a). The court first found that most of petitioner’s asserted bases for standing failed to satisfy the Article III requirement that a plaintiff “allege a distinct and palpable injury to himself” (*id.* at 11a).³ In the court’s view, petitioner satisfied that standard only to the extent that he alleged that he had been precluded from serving as a guest chaplain. The court also held (*id.* at 16a-22a) that petitioner had failed to show that his exclusion from the chaplain program was “fairly traceable” to the actions of the Chaplains or the Executive Branch defendants. In particular, petitioner had not alleged that either house had “granted its chaplain discretionary authority such that, with the chaplain’s assent, there would have been a ‘substantial probability’ of [petitioner’s] addressing either house of Congress” (*id.* at 19a). Even if petitioner had so alleged, “such an allegation could not be seriously entertained” since “the opportunity to address either house is a privilege rarely extended to outsiders, and then only with the approval of the members of the respec-

² Thereafter, in a separate decision relying on subsequent correspondence between Reverend Halverson and petitioner, and invoking separation of powers concerns, the district court dismissed Count Two and vacated the preliminary holdings in the earlier decision to the extent they concerned Count Two of the complaint (Pet. App. 62a-77a). Petitioner did not appeal this decision (Pet. 6 n.5).

³ In particular, the court rejected (Pet. App. 12a-15a) petitioner’s assertion of federal taxpayer standing, finding that his claim did not satisfy the prerequisites of *Flast v. Cohen*, 392 U.S. 83 (1968). It also held that petitioner lacked standing insofar as he was alleging a stigmatic injury to non-believers (Pet. App. 15a-16a).

tive houses" (*ibid.*). And in any event, the court explained (*ibid.*), the "strong endorsement of congressional prayer" by members of the Congress "undermine[s] any contention that the leadership of either house had authorized the chaplains to transform the period reserved for prayer into what [petitioner] has styled an 'opening ceremony' in which 'non-theistic' remarks could be delivered, however uplifting."

Judge Ruth Ginsburg dissented from the court's standing decision, although she agreed that petitioner's claim had been properly dismissed by the district court (Pet. App. 26a-39a). In her view, petitioner satisfied the requirements of Article III insofar as he alleged that the "'government must be blind to classifications based on theistic belief'" (Pet. App. 38a (citation omitted)). But like the district court, Judge Ginsburg concluded that petitioner's claims were foreclosed on the merits by *Marsh*. Rejecting petitioner's contention that *Marsh* applies only to Establishment Clause challenges, Judge Ginsburg explained (*id.* at 29a) that under *Marsh* "the existing legislative prayer practice * * * fits into a special nook – a narrow space tightly sealed off from otherwise applicable first amendment doctrine." Judge Ginsburg noted that petitioner had "misdescribed what the rules of Congress authorize," in that "[n]either the House nor the Senate authorizes its chaplain to conduct 'opening ceremonies' or 'speaker programs'" (*id.* at 28a). Accordingly, she stated (*id.* at 29a), petitioner's claim "is inevitably an attack on Congress' customary, opening-with-prayer observance." That claim, Judge Ginsburg concluded, is implicitly rejected by *Marsh*. "Because of the 'unique' historical roots of prayer to open the legislature's day, * * * and the status of prayer in that context, unadorned by surrounding ceremony, as 'part of the fabric of our society,' * * * [petitioner] has, under current jurisprudence, no tenable

free speech, establishment clause, or due process claim to advance" (*id.* at 30a (citation and footnote omitted)).

ARGUMENT

Petitioner asks this Court to review the judgment of the court of appeals holding that petitioner lacked standing to challenge his exclusion from the guest chaplain program in Congress. We are uncertain as to the validity of the court of appeals' reasoning on that issue. However, no further review of the case is warranted because, as Judge Ginsburg demonstrated (Pet. App. 26a-39a), petitioner's substantive claims are wholly without merit.

1. Since colonial times, national and state legislatures have invited clergymen to offer an invocation or prayer in connection with the performance of the legislature's business. The First Congress, for example, "provided for the appointment of two chaplains of different denominations who would alternate between the two Chambers on a weekly basis." *Marsh v. Chambers*, 463 U.S. 783, 793 n.13 (1983). Throughout most of our history, both Houses of Congress have had a designated Chaplain, with his or her services supplemented in a limited way by visiting or guest chaplains.

Current Senate Rules contain two references to the duties of the Chaplain. Rule IV, para. 1(a) refers to the approval of the Journal, "following the prayer by the Chaplain." Paragraph 2 of the same rule provides: "During a session of the Senate when that body is in continuous session, the Presiding Officer shall temporarily suspend the business of the Senate at noon each day for the purpose of having the customary daily prayer by the Chaplain." See *Standing Rules of the Senate and Congressional Budget and Impoundment Control Act of 1974, as amended*, S. Doc. 100-4, 100th Cong., 1st Sess. 3-4 (1987).

The rules of the House of Representatives contain three references to the Chaplain. Rule II states that “[t]here shall be elected by a viva voce vote, at the commencement of each Congress, to continue in office until their successors are chosen and qualified, a Clerk, Sergeant-at-Arms, Doorkeeper, Postmaster, and Chaplain.” Rule VII, entitled “Duties of the Chaplain,” provides that “[t]he Chaplain shall attend at the commencement of each day’s sitting of the House and open the same with prayer.” Finally, Rule XXIV, para. 1, provides that “[t]he daily order of business shall be as follows: First. Prayer by the Chaplain.” See W. Brown, *Constitution – Jefferson’s Manual and Rules of the House of Representatives*, H.R. Doc. 99-279, 99th Cong., 2d Sess. 323-333, 627 (1987).

2. In Count One of his complaint – the part whose dismissal he appealed to the court of appeals – petitioner alleged that his exclusion from the guest chaplain program violates the Establishment Clause and free speech component of the First Amendment, and the equal protection component of the Due Process clause of the Fifth Amendment (Pet. 5). In essence, petitioner asserted that “by opening their podiums to other chaplains who desire to give opening remarks to Congress, each Chaplain has created a limited public forum or a nonpublic forum for opening remarks” and that petitioner “has discriminatorily been denied access to express his viewpoint” (Pet. App. 47a).

As the district court held, however, and as Judge Ginsburg agreed, that claim is foreclosed by this Court’s decision in *Marsh*. There, the Court upheld against an Establishment Clause challenge the practice of the Nebraska Legislature of opening each legislative day with a prayer by a chaplain paid by the State.⁴ The Court noted

⁴ Like the Congress, moreover, the Nebraska Legislature permitted guest chaplains to officiate at the request of various legislators (463 U.S. at 793).

(463 U.S. at 786) that “[t]he opening of sessions of legislative and other deliberative bodies with prayer is deeply embedded in the history and tradition of this country.” Indeed, the Court explained (*id.* at 788 (footnote omitted)), “the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.” As the Court concluded (*id.* at 790), “[i]t can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.”

The *Marsh* case, Judge Ginsburg correctly observed, “expressly or by clear implication” (Pet. App. 35a) forecloses petitioner’s claims. Just as it is unreasonable to suppose that the Framers of the First Amendment viewed the Establishment Clause as a bar to prayer in the Legislature, so too is it untenable to contend, as petitioner does, that the Framers intended the establishment or free speech component of the First Amendment as “equal time” provisions, mandating “non-theistic” speech-making whenever Congress permits religious invocations. To the contrary, as Judge Ginsburg explained (*id.* at 29a), “the existing legislative prayer practice, *Marsh* plainly indicates, fits into a special nook—a narrow space tightly sealed off from otherwise applicable first amendment doctrine.”

2. More generally, petitioner’s claim ignores the fact that “the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.” *United States Postal Service v. Council of*

Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981). “‘The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.’” *Greer v. Spock*, 424 U.S. 828, 836 (1976) (citation omitted). In particular, “[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy.” *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 283 (1984). As this Court explained in *Minnesota State Bd.*, “[p]olicymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted” (*id.* at 284). This limitation on the right to address the legislature personally stems both from “separation-of-powers concerns” (*id.* at 285), as well as from the practical recognition that some “petitions for redress of grievances” may not always be “consistent with other necessary purposes of public property.” *Adderley v. Florida*, 385 U.S. 39, 54 (1966) (Douglas, J., dissenting). Thus, as Justice Douglas, dissenting in the *Adderley* case, noted, “[n]o one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally” (*ibid.*).

Finally, the fact that the House and Senate Chaplains have invited other persons to serve as guest chaplains does not change the analysis. No person can claim a constitutional right to address Congress without its permission, and nothing in the record suggests that any such “public forum” right has been created by extending invitations to guest chaplains. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983); *Greer v. Spock*, 424 U.S. at 838 n.10. To the contrary, as the district court found (Pet. App. 54a), “the permission of the appropriate Chaplain is required for an individual to appear as a guest

chaplain either before the House or the Senate" and "the Chaplains have consistently exercised discretion in choosing guest chaplains, most obviously by imposing the requirement that they say a prayer." Thus, as the district court concluded (*ibid.*), the guest chaplain program is not a public forum and accordingly may make "distinctions in access on the basis of subject matter and speaker identity" that "are reasonable in light of the purpose which the forum * * * serves" (*Perry Educ. Ass'n*, 460 U.S. at 49 (footnote omitted)). Here, the Chaplains made just such a reasonable distinction, denying participation to a speaker who, for reasons of principle, could not fulfill the basic purpose of the chaplaincy: to offer a prayer.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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